In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1159

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER

v.

SCENIC HUDSON PRESERVATION CONFERENCE, TOWN OF CORTLANDT, TOWN OF PUTNAM VALLEY, TOWN OF YORKTOWN, AND FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

The Federal Power Commission believes (as does the petitioner) that the court of appeals, which set aside the license issued to petitioner, went beyond the proper bounds of a reviewing court at a number of points, substituting its judgment as to certain facts and the inferences to be drawn therefrom for those of the Commission. Cf., *Consolo* v. *Federal Maritime Commission,* No. 63, this Term, decided March 22, 1966. However, the government decided not to apply for certiorari because the Commission, to the extent that it questions the opinion below, does not quarrel

218-596—66

with the basic substantive or procedural standards which the court prescribes for Commission consideration of applications for licenses for hydroelectric developments, but only with the court's application of those standards to the particulars of this case.

The Commission believes that the court of appeals' opinion must be read in the context of the court's determination (with which, to be sure, it disagrees) that the record upon which the Commission reached its decision was so deficient in several basic respects as to warrant what otherwise would be clearly untimely attempts to supplement the record, and consideration by the court itself of considerable extra-record material. In short, while the Commission believes that the decision below is subject to many of petitioner's criticisms, the agency does not believe that the decision will seriously inhibit it in performing its statutory responsibilities to applicants for Commission licenses and to the public at large.

The primary holding of the court below is that the Commission's duty (as set forth in Section 10(a) of the Federal Power Act) to insure that any hydroelectric project it authorizes "will be best adapted to a comprehensive plan for improving or developing a waterway * * * for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes" embraces a positive responsibility to canvass all facets of the public interest, including the nation's interest in the preservation of areas of scenic beauty. With this, the Commission is in complete agreement. In-

deed, the Commission noted in its opinion that, in view of the scenic nature of the proposed site of petitioner's pumped storage project, it was required to "compare the Cornwall project with any alternatives that are available" (Pet. App. 16a). Also, as the court observed (Pet. App. 10a), the Commission in recent years has consistently required that the non-power aspects of waterway development shall be materially enhanced by any private licensee wishing to utilize the nation's water power resources. Repeatedly, the Commission has given special emphasis to the recreational possibilities of the reservoirs created by such projects. It has also recognized that there are instances in which the advantages of *any* power development are outweighed by the recreational and scenic value of a waterway in its natural state.

Nor does the Commission believe that its role in the licensing process is limited to that of an umpire evaluating the contentions of the parties and the evidence which they proffer. In keeping with the Act's scheme, the Commission consults the expert opinions of competent federal and State authorities in such matters as navigation, flood control, protection of fishery resources, recreation, and control of pollution. It is well aware, moreover, that the ultimate responsibility rests with it and that only its positive efforts will assure optimum development of the nation's waterways. We note that in this case it was the Commission staff which developed and presented upon the record alternative routes for the primary transmission lines—routes which the staff believed would obviate problems presented by the applicant's plans.

We fully agree, then, with the court below that where, as here, a formal hearing on an application is required, it is indeed incumbent on the Commission to make certain that an adequate record is made on all significant issues in controversy.

In sum, the Commission's disagreement is with the court of appeals' factual conclusion that the Commission failed to make an adequate record in this proceeding. Specifically, the Commission questions the action of the court in appraising the evidence of record by reference to tardy tenders and untested statements made in collateral legislative proceedings. But the government does not read the court's opinion as requiring the Commission, in considering the practicable alternatives, to introduce evidence to negate all possible substitutes, no matter how fanciful, or to reopen an already comprehensive record whenever any opposing party makes a belated offer of new evidence. Cf., *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503. Accordingly, we have not sought this Court's review.

Respectfully submitted.

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Solicitor General.

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General Counsel,
Federal Power Commission.

APRIL 1966.

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